

STATE OF NORTH DAKOTA
Information Technology Department
600 East Boulevard – Dept. 112
Bismarck, ND 58505-0100



Request For Proposals

RFP 112-0405

ADDENDUM #5

Date of Issue: 25 May 2004

Public Safety Mobile Radio Communications:

State of North Dakota Information Technology Department is soliciting proposals for the replacement of the statewide public safety radio communications system with state-of-the-art equipment utilizing Project 25 standards.

Bidders are not required to return this form

Jerry Fossum, Director of Telecommunications
Information Technology Department
Procurement Officer

ADDENDUM #5

Appendix A – Contract Form - Personal Service Contract

4. Termination of Contract

Requests clarification regarding the termination provision, as follows:

- A. In the event that the contract is terminated without cause or for lack of funding or authority, will the State be liable to the Contractor for equipment and services provided to the date of notice to terminate?
- B.
- C. **ANSWER: Generally the State will pay for anything we have in our possession and are using. If they have something that they plan to send us and we terminate before it is sent, we do not pay. This is something that the State can negotiate a bit once a contract has been awarded, but it has to be very one-sided. The bottom line is that if the legislature doesn't authorize the money, there is no money to give.**
- D.
- B. In the event that the State gives written notice of default, will the State give the Contractor an opportunity to provide a satisfactory plan of action to cure said default before terminating the contract?
- C.
- D. **ANSWER: Generally the State does allow an opportunity to cure. Again, this is something that we can negotiate once a contract has been awarded. It would be for a limited time, possibly 30 days, depending on the type of contract and issues involved.**

13. Indemnity

Requests clarification regarding the indemnification provision, as follows:

Please remove the word "sole" in the first sentence, so that it reads "except for claims resulting from or arising out of North Dakota's negligence". We will not agree to defend and indemnify North Dakota for claims that arise out of their negligence.

The second sentence states they won't agree to defend and indemnify North Dakota for claims that arise out of their negligence. Yet, under the insurance provision, the contractor agrees to name the State as an additional insured which means the State would have the same rights and coverages under the Contractor's policy - defense and indemnity. By removing the word "sole" we would have a conflict in the two provisions. For that reason the State recommends not removing the

word "sole" and requires the vendor to indemnify the State for claims that arise out of or result from the agreement.

- A. The indemnification language as drafted excludes claims resulting from North Dakota's sole negligence. In the event of North Dakota's contributory negligence, does it expect the Contractor to fully indemnify it for North Dakota's negligent acts?

B.

ANSWER: The indemnification language contained in the RFP is the language the insurance industry considers an "intermediate" indemnification provision. This provision is appropriate when a party to be indemnified is named an additional insured under the other party's commercial general liability policy. Additional insured status means the State (in this case) has the same rights and coverages as the contractor under contractor's policy. The indemnification provision, as written, corresponds to the State's designation as an additional insured under the insurance requirements.

C.

D.

Would the State consider an indemnification provision where the Contractor indemnified the State for damage caused by the negligence of the Contractor, its subcontractors, or their employees or agents, while performing their duties under this Agreement?

ANSWER: Again, the intermediate indemnification provision is appropriate when the State is named an additional insured.

- A. Please clarify the provision where the Contractor shall also indemnify the State for all costs, expenses, and attorneys' fees incurred in establishing and litigating the indemnification coverage.

ANSWER: If the Contractor fails to comply with the provisions of the indemnification provision and State is required to litigate against Contractor to recover any damages it is required to pay, or costs to defend a third-party claim, Contractor agrees to not only reimburse State for those expenses but to also reimburse State for the costs it incurs to collect those amounts from Contractor.

- C. Does North Dakota expect the indemnification obligation to continue indefinitely? Does that mean that the Contractor would be required to indemnify the State for actions that occurred after the contract and any extensions had expired? Would the State consider an indemnification provision where the indemnification obligation continues through the

contract life and any extensions?

ANSWER: The State is seeking indemnification for Contractor's operations under the contract and completed operations under the contract.

14. Insurance

A. Required Coverages.

1 and 2) Please remove "minimum liability limits of \$250,000 per person". Our insurance does not provide coverage on a per person basis. The limit of \$1MM per occurrence is okay.

ANSWER: - The State has is no problem removing the \$250,000 per person requirement.

Vendor substantially agrees to comply with the Insurance language, as modified below:

- 1) Vendor agrees to provide commercial general liability, including contractual
- 2) liability at the required minimum liability limits.
- 2) Vendor agrees to provide business Automobile liability at the required minimum liability limits.

B. General Insurance Requirements.

- 1) Please remove the last sentence, "The amount of any deductible or self retention is subject to approval by the state." We do not provide our deductibles on our certificates.

ANSWER: The State has no problem removing the requirement that we approve the deductible or self retention. That is intended to apply to contracts where we are dealing with individuals where there may be a question if they are financially responsible for the deductible amount. That issue doesn't come into play here.

- 1) Vendor and its insurer are unable to agree to require the State to approve the amount of any deductible or self-retention as we deem our policies and deductibles as confidential and proprietary.

ANSWER: The State agrees to remove this requirement.

- 3) Vendor requests deletion of this provision as all indemnification requirements should be set forth in the indemnification provision of the contract.

ANSWER: The State requires documentation of adequate insurance to address these exposures.

- 4) Please remove the following from the last sentence, "The additional insured endorsement for the commercial general liability policy shall be written on a form equivalent to the ISO 1985 CB 20 10 form, or such other form as approved by the state". We do not use the ISO 1985 form however ours is similar and has been agreed to be the carrier.

ANSWER: As to the ISO 1095 CB 20 10 requirement, since they say their form is similar, we only require equivalent so that should not be an issue. We should ask to review their endorsement to see if it meets our needs.

- 5)
6) Vendor agrees that North Dakota shall be listed on the Certificate of Insurance as additional insured for the commercial general liability policy. Vendor requests removal of the reference to any excess policies. Vendor agrees that North Dakota shall have the same rights and coverages as CONTRACTOR under said policies. Vendor requests deletion of the remainder of this section as North Dakota will be listed as an additional insured on the Certificate of Insurance rather than on an additional endorsement.

7)
ANSWER: A Certificate of Insurance does not bind the carrier. A Certificate only documents the reported coverages are in place at the time the Certificate is issued. The only documentation the State has that the coverages required pertaining to it being named an additional insured are in place is an endorsement to the policy. Accordingly, the State cannot agree to this revision.

- 7) Please delete the following, "if requested, a copy of the insurance policy and all its endorsements". We do not provide copies of our policies to anyone outside the company.

ANSWER: We need to require an opportunity to review the endorsement. And, we should not settle for a Certificate of Insurance. A Certificate does not bind the insurer and is not documentation that the additional insured endorsement is in place. An endorsement would give us that documentation. We could eliminate the need to review the policy.

We should not accept the limitation of indemnification to damages not to exceed the total purchase price.

- 7) Vendor agrees to furnish a certificate of insurance listing North Dakota as an additional insured, to the undersigned STATE representative prior to commencement of this contract. Vendor is unable to agree to provide a copy of the insurance policy and all endorsements to the State as we deem our policies and deductibles as confidential and proprietary.

ANSWER: The State will agree to waive the requirement to review Contractor's insurance policy and endorsements but will require receipt of a copy of the endorsement naming the State as an additional insured.

19. Work Product, Equipment and Materials

Vendor requests clarification regarding the work product, equipment and materials provision, as follows:

The language, as drafted, states that all work product created or purchased belongs to the State. Does the State intend this to mean that it has rights to the Contractor's intellectual property used to create the system? Does the State intend this to mean that it will own title to the Contractor's software, including all rights in patents, copyrights, trade secrets, and other intellectual properties?

ANSWER: The State does not intend this to mean that it has rights to the Contractor's intellectual property used to create the system. The State does not intend this to mean that it will own title to the Contractor's software, including all rights in patents, copyrights, trade secrets, and other intellectual properties.

22. State Audit

Vendor requests clarification regarding the audit provision, as follows:

The language, as drafted, states that all records, accounting practices and procedures relevant to this contract are subject to examination. What specific records do the State wish to examine?

Please provide more detail regarding the accounting practices and procedures the State wishes to review.

ANSWER: Anything that has anything to do with the specific contract between the state and the contractor. Documents related to other contracts or other areas of their business are not what we are interested in.

Supplemental Provision

Vendor requests clarification regarding any limitation of liability, and requests adding the following language to the Contract:

Except for personal injury or death, Contractor's total liability, whether for breach of contract, warranty, negligence, strict liability in tort, indemnification, or otherwise, will be limited to the direct damages recoverable under law, but not to exceed the total purchase price of the contract. ALTHOUGH THE PARTIES ACKNOWLEDGE THE POSSIBILITY OF SUCH LOSSES OR DAMAGES, THEY AGREE THAT CONTRACTOR WILL NOT BE LIABLE FOR ANY COMMERCIAL LOSS; INCONVENIENCE; LOSS OF USE, TIME, DATA, GOOD WILL, REVENUES, PROFITS OR SAVINGS; OR OTHER SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES IN ANY WAY RELATED TO OR ARISING FROM THIS AGREEMENT, THE SALE OR USE OF THE EQUIPMENT OR SOFTWARE, OR THE PERFORMANCE OF SERVICES BY VENDOR PURSUANT TO THIS AGREEMENT. This limitation of liability will survive the expiration or termination of this Contract.

The State of North Dakota does not agree to add the above identified Supplemental Provision language to the contract.

ADDITIONAL CLARIFICATION:

6.10.1.2 Individual Coverage Maps – page 87

This section identifies that maps must be of the scale of 1:500,000 – this requirement has been reevaluated, alternative map scales will be accepted.